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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of
OJEDA BROADCASTING, INC.
For Construction Permit
for a New FM Station on
Channel 243A in
Hobbs, New Mexico

MM DOCKET NO. 93-43

File No. BPH-910705ML

To: Hon. John M. Frysiak
Administrative Law Judge

MOTION FOR SUMMARY DECISION

OJEDA BROADCASTING, INC.

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June 8, 1993

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SUMMARY

Ojeda Broadcasting, Inc. ("Ojeda") is the sole applicant for a new FM station to operate on Channel 243A in Hobbs, New Mexico. Its principals, Perla Acosta Ojeda and Hermilio Ojeda, are wife and husband. The Ojedas are of Hispanic origin and they have lived in Hobbs for a combined total of over 55 years. They both are outstanding community leaders, and they both have extensive local broadcast experience.

Issues have been designated against Ojeda to determine (1) whether it had reasonable assurance of financing at the time of certification, and (2) whether it misrepresented facts or lacked candor when it certified its financial qualifications to the Commission. Ojeda is seeking summary decision in its favor on both of the specified issues, which would render its application eligible for an immediate grant.

Summary decision is appropriate where the movant demonstrates through sworn affidavits or other appropriate materials that there exists no genuine issue of material fact that requires examination at hearing. Here, there is no dispute that Ojeda amended its application as a matter of right to

prevailing interest rates, and the likely amortization period of

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MOTION FOR SUMMARY DECISION

Ojeda Broadcasting, Inc. ("Ojeda"), by its counsel and pursuant to Section 1.251 of the Commission's Rules, 47 C.F.R. §1.251, hereby moves for summary decision in its favor on the issues specified against it in the Hearing Designation Order, DA 93-215, released March 9, 1993 ("HDO"). The designated issues seek to determine (1) whether or not Ojeda was financially qualified at the time she filed her application^{1/}, and; (2) whether Ojeda misrepresented facts or lacked candor with the Commission in certifying its financial qualifications. The materials attached to this motion as Exhibits 1-5 conclusively

establish that Issue 1 must be resolved in Ojeda's favor as a matter of law, and that, with regard to Issue 2, Ojeda certified its financial qualifications in good faith and without any intent to deceive. Accordingly, there exists no genuine issue of material fact that requires examination at hearing, and the specified issues may be resolved in Ojeda's favor by summary decision.

In support whereof, Ojeda respectfully states as follows:

I. INTRODUCTION

1. Ojeda is the sole applicant for a new FM facility in Hobbs, New Mexico. Originally, Ojeda's application was filed by Perla Acosta Ojeda as an individual applicant. However, Mrs. Ojeda subsequently amended her application as a matter of right on September 18, 1991, prior to the B cut-off deadline, to substitute Ojeda as the new corporate applicant. A copy of that tender amendment is attached to this motion as Exhibit 1.^{2/} Perla Acosta Ojeda is the President, Treasurer and Director of Ojeda, and she owns 80% of the applicant's authorized stock. Hermilio Ojeda, Perla Acosta's husband, owns 20% of the applicant's stock but is neither an officer nor a director of the corporation.^{3/} The Ojedas are both of Hispanic origin and

^{2/} The engineering exhibit to that amendment is omitted from the attached Exhibit 1.

^{3/} Mr. Ojeda's first name may be correctly spelled either as Hermilo or Hermilio, as it is spelled in Exhibit 1 hereto.

they have lived in Hobbs, New Mexico, the proposed station's community of license, for a combined total of over 55 years. See Affidavit of Perla Acosta Ojeda attached as Exhibit 2 (at ¶2). Moreover, they both are active and longstanding community leaders and they both have substantial broadcast experience in the proposed market. Id. at ¶¶2-3.

2. As demonstrated below, Exhibit 1 to this motion shows that Ojeda amended its financial proposal as a matter of right on the tender deadline, thereby mooted any question as to its original financial qualifications. Exhibit 2 is a letter from the United New Mexico Bank ("UNMB") dated September 16, 1991, which the Ojedas relied on, in part, to support their new financial proposal. Exhibit 3 is an affidavit of Perla Acosta Ojeda that explains, inter alia, the steps Ojeda took to establish reasonable assurance of financing prior to certification. Exhibit 4 establishes that, at the time of certification, Ojeda actually had sufficient net liquid assets in the form of cash on hand to meet its projected expenses. And Exhibit 5 is an affidavit from D. Kirk Edens, the former Executive Vice President of UNMB and the person who was originally listed in Ojeda's application as its contact at the bank, which corroborates Mrs. Ojeda's testimony concerning the applicant's dealings with the bank prior to certification.

II. ARGUMENT

3. The Commission's Rules provide that summary decision may be granted where there exists no genuine issue of material fact that requires examination at hearing. 47 C.F.R. §1.251(a). The purpose of this rule is to avoid unnecessary hearings where material facts are not in dispute. Summary Decision Procedures, 34 FCC 2d 485, 487 (1972); see, Telecorpus, Inc., 30 RR 2d 1641 (ALJ 1974). Where, as here, the party seeking summary decision establishes through sworn affidavits or other suitable materials that no triable issue exists, summary decision is appropriate. See, Ramon Rodriguez & Associates, 66 RR 2d 1878, 1879 (Rev. Bd. 1989). The materials and sworn affidavits attached to this motion as Exhibits 1-5 satisfy this requirement and conclusively establish that the specified issues should be resolved in Ojeda's favor by summary decision, thereby clearing the way for an immediate grant of its application.

(A) Ojeda's Tender Amendment Mooted Any Questions About Its Initial Financial Qualifications.

4. Exhibit 1 is a date-stamped copy of an amendment to Ojeda's application that was filed with the Commission on September 18, 1991. The amendment was filed as a matter of right within 30 days of the date that a Public Notice was released accepting Ojeda's application for tender. See, Public Notice, Report No. 15062 (released August 20, 1991). Therein, Ojeda amended its application to substitute a new financial

proposal based, in part, on a new bank letter that it had obtained from UNMB dated September 16, 1991. A copy of that letter is attached to this motion as Exhibit 2.4/

relieve...[the applicant] of the need to establish the validity of his initial financial proposal." Scioto, 6 FCC Rcd 1893 (¶2.) In particular, the Commission noted that the applicant had timely amended his application as a matter of right to substitute a new financial proposal. Accordingly, the Commission found that "any questions concerning the adequacy of ...[the applicant's] prehearing financial showing became moot." Id.

7. Likewise, in a closely analogous case, the Commission held in Great Lakes Broadcasting, 6 FCC Rcd 4331 (1991), that an applicant's amendment as a matter of right to specify a new transmitter site "mooted any deficiency in [the applicant's] reasonable assurance concerning its original site." Id. at 4332 (¶10). Significantly, the Commission found that "because... [the applicant] filed an amendment as of right, there is no basis for addition of an issue concerning whether... [the applicant] had reasonable assurance when it filed its application." Id. The Commission therefore reversed the ALJ's adverse resolution of the site availability issue against the applicant and found that his dismissal of the application based on a lack of site assurance at the time of certification was "unfounded." Id., 6 FCC Rcd at 4332, n.8.

8. In this case, there is no dispute that Ojeda timely amended its application as a matter of right on September 18,


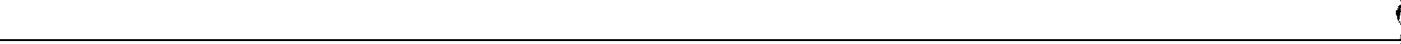






1991, to substitute a new financial proposal based, in part, on a new financing letter from UNMB dated September 16, 1991. See Exhibit 1 and Exhibit 2. Thus, under Scioto any issue as to whether or not Ojeda had reasonable assurance of financing at the time of certification was rendered moot by its tender amendment. Issue 1, therefore, should be resolved in Ojeda's favor as a matter of law.

(B) Ojeda Had Reasonable Assurance of
Financing At The Time Of Certification.

9. Even assuming, arguendo, that Issue 1 were not mooted by Ojeda's tender amendment, the attached materials show that Ojeda possessed reasonable assurance of financing at the time of certification. Specifically, the evidence demonstrates that prior to certification the Ojedas developed cost estimates in consultation with their consulting engineer. See Exhibit 3 at ¶¶4-5. They then took stock of their financial resources and determined that they had more than \$55,000 in cash on hand that was immediately available to cover their anticipated costs of \$50,000. See Exhibit 3 at ¶¶4-5 and Exhibit 4. Thus, even

the Ojedas decided to meet with D. Kirk Edens at UNMB to discuss the bank's willingness to provide back-up financing for the proposed station. See Exhibit 3 at ¶7.

10. On the morning of July 1, 1991, the Ojedas met with Edens at the bank. See Exhibit 3 at ¶8; Exhibit 5 at ¶¶2-3. By that time, the Ojedas had been customers of UNMB for over 10 years (over 20 years for Hermilio), and they were familiar to Edens as "well-established members of the community and longstanding customers of the bank." Exhibit 3 at ¶8; Exhibit 5 at ¶3. During their meeting, the Ojedas discussed with Edens their operating and business plans, their past broadcast experience, their cost estimates for the station, their financial resources, and their proposed equity contribution to the project. Exhibit 3 at ¶9; Exhibit 5 at ¶¶3-4. Moreover, they discussed the bank's lending practices and the terms under which it would likely extend the requested loan, including the bank's then prevailing interest rate, its collateral requirements, and the likely duration of the loan. See Exhibit 3 at ¶9 and Exhibit 5 at ¶¶4-6. Based on his review of their financial condition, their significant cash equity contribution, their impressive sales experience and knowledge of the Spanish language radio market, and their longstanding relationship with the bank, Edens told the Ojedas that the bank would likely consider their loan request favorably and he provided them with the July 1, 1991 bank letter that is at issue in this



Although the terms of the letter (which was drafted without reference to a model and without the assistance of counsel) were intentionally left unspecific in order to make it plain that the bank was in no way committed to funding the project, the Ojedas' longstanding relationship with the bank and their "serious and earnest discussions" with Edens concerning their financing plans and preliminary qualifications were more than sufficient to establish reasonable assurance that the bank would consider their loan request favorably following a grant of their FCC

qualifications, there must be substantial evidence of an deliberate intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983); Armando Garcia, 3 FCC Rcd 1065, 1067 (Rev. Bd. 1988); Northampton Media Associates, 3 FCC Rcd 5164, 5167 (Rev. Bd 1988)(subsequent history omitted). There is not a scintilla of evidence here to support such a finding of deceptive intent. To the contrary, the attached exhibits conclusively demonstrate that Ojeda acted reasonably and in good faith when certifying its financial qualifications.

12. Specifically, the evidence shows that prior to certification, the Ojedas prepared a budget, confirmed that they had sufficient net liquid assets in the form of cash on hand to cover their anticipated costs, and met with Edens at UNMB to discuss the bank's willingness to provide backup financing in the event of cost overages. See Exhibit 3 at ¶¶8-10; Exhibit 5 at ¶¶3-7. Then, based on her assessment of their financial resources and the assurances that she and her husband had received from Edens, Mrs. Ojeda certified the applicant's financial qualifications. In this regard, Mrs. Ojeda unequivocally states that, at the time of certification, she had "no doubt that we had sufficient funds available to construct and commence operations of our proposed station." Exhibit 3 at ¶11. Likewise, she swears that she and her husband believed, in good faith (and without the benefit of assistance from communications counsel), that they "had taken all the steps necessary to establish our financial qualifications before I

signed the application. It was never my intention to falsely certify or misrepresent our financial qualifications to the FCC, and I signed our application in good faith and without any intent to deceive." Id.

13. Therefore, even assuming, arguendo, that the Ojedas were mistaken in believing that they had reasonable assurance of financing at the time of certification, there is absolutely no evidence to suggest that they were acting in bad faith or with any intent to deceive when Mrs. Ojeda certified their financial qualifications. See, Great Lakes, supra, at 4332 (§11) (no lack of candor found where applicant certified her application based upon an erroneous but good faith belief that she had secured reasonable assurance of site availability); Harrison County Broadcasting Co., 6 FCC Rcd 5819 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 2993 (1992) (no lack of candor found where applicant earnestly believed at the time of certification that it had secured reasonable assurance of site availability); Dorothy J. Owens, 5 FCC Rcd 6615, 6618 (§14) (1990) (no false certification issue found where the applicant testified that she had discussed her plans with the bank and had been told "that it would favorably consider making me a loan...if my application were granted."). To the contrary, the evidence clearly shows that Mrs. Ojeda never intended to falsely certify or misrepresent

there is no genuine issue of material fact that requires examination at hearing. Thus, Issue 2 should also be resolved in Ojeda's favor by summary decision.

14. Ojeda is the sole applicant for the Hobbs facility, and resolution of the specified financial issues in its favor would render its application immediately grantable. Therefore, granting summary decision in Ojeda's favor would clear the way for Mr. and Mrs. Ojeda to fulfill their lifelong dream of owning and operating the first Spanish language radio station licensed to their home town of Hobbs, New Mexico. See Exhibit 3 at ¶3. If ever an applicant has showed promise of providing superior service to the public, Ojeda is that applicant. The son and daughter-in-law of immigrant farm workers who brought their family to the United States in the hope of leading a better life, the Ojedas stand poised to fulfill the American dream. See Exhibit 3 at Appendix A. They both have lived in the station's community of license for decades (Mrs. Ojeda for her entire life) and they both have played an active and vital role in promoting the positive development of the community. They will not only fulfill the Commission's objective of bringing diversity to ownership and programming through their Hispanic heritage, they also will bring much needed programming service to the area's substantial Hispanic population through their operation of the proposed facility as the first and only Spanish language station licensed to Hobbs. Additionally, and perhaps most significantly, they both have the real world knowledge and

experience necessary to make the station a success. In this regard, they both have significant local broadcast experience dating back to at least 1979 (1973 for Hermilio) and, through this experience, they have developed excellent contacts among advertisers and listeners in the market. See Exhibit 3 Appendix A. They currently produce a Spanish language program that is broadcast on Radio Station KLEA(AM) from a studio that they own which is adjacent to their home, and they stand ready to commence operations of their own station almost immediately if their application is granted. If the past is any indication of how the Ojedas will operate their proposed station, it is clear from the outstanding community oriented programming efforts described in Exhibit 3 Appendix A that they will serve the public exceptionally well. In short, it would be an tragedy for this family and the community in general if the Ojedas were not permitted to construct and operate their proposed station.


CONCLUSION

15. Ojeda has established through sworn declarations and other appropriate material that there exists no genuine issue of material fact that requires examination at hearing, and that the issues specified against it in the HDO should be resolved in its favor as a matter of law. Accordingly, Ojeda respectfully requests the issuance of an order (a) resolving the designated issues in its favor by summary decision, and (b) granting its

application for a new FM station on Channel 243A in Hobbs, New Mexico.

Respectfully submitted,

OJEDA BROADCASTING, INC.

By: 
Nathaniel F. Emmons
Mark N. Lipp
Christopher A. Holt

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September 18, 1991

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE
SECRETARY

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.--Room 222
Washington, D.C. 20554

Re: Perla Acosta Ojeda
Hobbs, New Mexico
File No. BPH-910705ML

Dear Ms. Searcy:

Enclosed for filing, on behalf of Perla Acosta Ojeda (File No. BPH-910705ML), are an original and two copies of an amendment to the above-referenced application for a new FM radio station to operate on Channel 243A at Hobbs, New Mexico.

The enclosed amendment is filed as of right within 30 days from the date that public notice was released accepting Ms. Ojeda's application for tender. See Public Notice, Report No. 15062, released August 20, 1991.

Please direct any questions regarding this amendment to me or to Mark N. Lipp of this firm.

Sincerely,



Christopher A. Holt
Counsel for Perla Acosta Ojeda

CAH/jt
Enclosures

Perla Acosta Ojeda
File No. BPH-910705ML

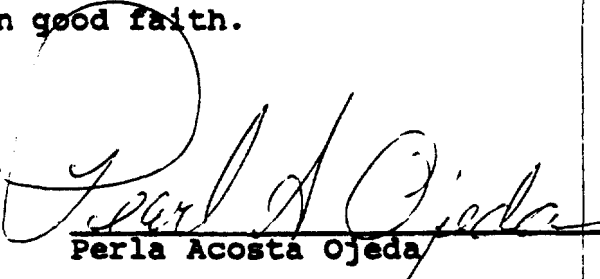
FCC Form 301

DECLARATION

The application of Perla Acosta Ojeda for a new FM radio station to operate on Channel 243A in Hobbs, New Mexico (File No. BPH-910705ML) is hereby amended in accordance with the attached amendment.

I certify that the information contained in this amendment is true, complete and correct to the best of my knowledge and belief, and is submitted in good faith.

9/18/91
Date


Perla Acosta Ojeda

AMENDMENT NO. 1

The application of Perla Acosta Ojeda for a new FM station to operate on Channel 243A in Hobbs, New Mexico (File No. BPH-910705ML) is hereby amended as follows:

1. To change the name of the Applicant to "Ojeda Broadcasting, Inc." everywhere that it appears in the application;
2. To change the response in Question 1 of Section II to "for-profit corporation;"
3. To state in response to Question 3 of Section II that the Applicant is a de facto corporation that is in the process of filing its enabling charter with the State of New Mexico;
4. To replace page 3 originally submitted with the page 3 attached hereto, and to submit the attached Exhibit 1 in response to Question 6, item 2 of Section II;
5. To submit the attached Exhibit 2 in response to Question 6, Item 7 of Section II;
6. To respond "yes" to Question 8(a) of Section II, and to submit the attached Exhibit 3 describing that response;

7. To replace Exhibit I, originally submitted in response to Question 9 of Section II, with the attached Exhibit 4;
8. To respond "yes" to Question 11(b) of Section II, and to submit the attached Exhibit 5 describing that response;
9. To replace page 6 originally submitted with the page 6 attached hereto, and to recertify that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue;
10. To replace Exhibit II originally submitted in response to Section IV-A with the attached Exhibit 6;
11. To strike Exhibit III originally submitted in response to Section IV-B; and
12. To supply the attached engineering statement and to replace the contour map, originally submitted as Figure 5A in response to Question 16(b) of Section V-B, with the attached Figure 5A.

8. List officers, directors, cognizable stockholders and partners. Use one column for each individual or entity. Attach additional pages, if necessary. See Instructions 4, 5, and 6.

Line (Read carefully - The numbered items below refer to line numbers in the following table.)

1. Name and residence of officer, director, cognizable stockholder or partner (if other than individual also show name, address and citizenship of natural person authorized to vote the stock). List officers first, then directors and, thereafter, remaining stockholders and partners.
2. Citizenship.
3. Office or directorship held.
4. Number of shares or nature of partnership interest.
5. Number of votes.
6. Percentage of votes.
7. Other existing attributable interests in any other broadcast station, including nature and size of such interest.
8. All other ownership interests of 5% or more (whether or not attributable), as well as any corporate officership or directorship, in broadcast, cable, or newspaper entities in the same market or with overlapping signals in the same broadcast service, as described in Sections 73.3555 and 76.501 of the Commission's Rules, including the nature and size of such interests and the position held.

1	(a)	(b)	(c)
	Ojeda Broadcasting, Inc.	Perla Acosta Ojeda	Hermilio Ojeda

Ojeda Broadcasting, Inc.
Hobbs, New Mexico
File No. BPH-910705ML

FCC Form 301
Section II
Question 6, Item 2

EXHIBIT 1

Hermilio Ojeda is presently a citizen of the Republic of Mexico, with official status as a resident alien of the United States. Mr. Ojeda obtained his U.S. residency in 1970, the same year that he moved to Hobbs, New Mexico, from the Republic of Mexico. Mr. Ojeda graduated from high school in Hobbs, New Mexico in 1973, and married Perla Acosta Ojeda, a U.S. citizen, in 1980.

Mr. Ojeda is presently preparing an application for U.S. citizenship, which he intends to file within the next 2-3 weeks. He has been advised that the processing of that application should take approximately 3-4 months and that citizenship is likely to be granted in light of his long-term residency in Hobbs, New Mexico, and the status of his wife and children as U.S. citizens.